NOTES

CUSTODY AWARDS AND THEIR RECOGNITION IN OTHER JURISDICTIONS—A court, exercising jurisdiction in a divorce proceeding, has the power when all the parties are before it to determine who shall have the custody of minor children.[1] The decree thus made is not a final one as the court generally reserves the power to amend or modify the award if the circumstances should warrant.[2] The enforcement of the award within the state presents no difficulties.[3] It is only when an attempt is made to give extraterritorial effect to an award that we meet obstacles. Should the court of one state recognize the custody awards issued by the courts of sister states? Under the full faith and credit clause of the Constitution [4] must they do so? Examination of the cases reveals so wide a disagreement that it may prove profitable in order to arrive at a proper and logical answer to first examine fundamental elements.

The courts of chancery have always had the power, in the exercise of the authority of the state as *parens patriæ*, to issue custody decrees. If the court having general equity powers is also invested with jurisdiction in divorce cases then it may of course, without express authority, continue to exercise this power as to minor children before it, but if these general equity powers are lacking then specific legislation is required.[5] The making of award decrees by divorce courts is such an accepted fact that rarely is the basis of the decree expressed, but instead the court contents itself with stating that the decree is authorized as an incident

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[1] SPENCER, DOMESTIC RELATIONS (1911) § 446. For a compilation of express legislation on this matter see 1 VERNIER, AMERICAN FAMILY LAWS (1931) § 54.

[2] Barrett v. Barrett, 210 Cal. 559, 292 Pac. 622 (1930); Salta v. Salta, 80 N. H. 218, 116 Atl. 438 (1921); Stausberry v. Stausberry, 237 Ky. 664, 36 S. W. (2d) 54 (1931); 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891) § 1187; SPENCER, DOMESTIC RELATIONS (1911) §448.

[3] The court may adjudge a defendant in contempt if he attempts to conceal the child in order to prevent the sheriff from carrying into effect the order of the court. Flack v. Flack, 180 N. C. 594, 105 S. E. 268 (1920).

[4] U. S. CONST. Art. IV, sec. 1: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." The theory which states that the basis of the law of conflicts is the enforcement of rights created by foreign law is fundamentally the theory upon which is based the enforcement of judgments under the full faith and credit clause of the Constitution. See Dodd, *Supreme Court Review in Conflict of Laws* (1926) 39 HARV. L. REV. 533, 536. It is the enforcement of legal rights created or definitely defined by a court of competent jurisdiction. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION (1922) § 200. An equity decree is not, however, within the contemplation of the full faith and credit clause. Note (1924) 72 U. OF PA. L. REV. 429. Thus an injunction restraining one from bringing suit is usually said not to have extraterritorial effect. Frye v. Chicago Ry. Co., 157 Minn. 52, 195 N. W. 629 (1923). But when legal rights of parties are settled the judgment is entitled to full faith and credit if the court had proper jurisdiction. Personal service upon the defendant is required in *in personam* actions but not if the action is *in rem*. 2 WATSON, THE CONSTITUTION (1910) 1202. A divorce action is of a peculiar nature and has been called *quasi in rem* for although personal in character a state may adjudicate as to the marital status even though the defendant did not receive personal service. BROWN, JURISDICTION (2d ed. 1901) § 75. The full faith and credit to which it is entitled has been definitely and rather arbitrarily defined by the Supreme Court. Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544 (1901); Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525 (1906). The custody award as an ancillary decree is also personal in nature in so far as it can affect the legal rights of the parties *inter sese*. But in so far as it orders one parent, for the child's benefit, to turn over custody to the other parent or enjoins the other from interfering with the custody then enjoyed, it is a chancery decree. This dual nature will naturally weigh in a determination of the decree's extraterritorial effect.

[5] *Supra* note 1.

to the divorce proceeding.[6] This may be sufficient for the purpose but when related problems arise it is highly important to keep in mind the true theories for the exercise of jurisdiction. Essentially there are two: (1) that the court as a disinterested person determines the *personal rights of the parents* with respect to the child; (2) that the court acts for the state as an interested party and provides for the best *welfare of the child.*[7] Under the former theory the state's interest is merely nominal for it is doing no more than to supply machinery for the peaceful settlement of a dispute. Under the latter, however, the state has a substantive interest in the decree[8] since it is of prime importance to the state that a child residing within its boundaries be properly provided for. When both parents are before the court and the child is residing within the state, it is evident that either theory is applicable. We may say that the court, having acquired jurisdiction over the persons of the parent, may then proceed to determine their individual rights, or that in the exercise of its function as an arm of the state, the court may act to provide for the best interests of its subjects within the state.

A custody award is also proper when the child is residing within the territorial jurisdiction even though one of the parents is outside the state and has not received personal service.[9] Similarly, when personal service within the state has been made on the parents but the child is residing outside the territorial limits of the state we may still say that a custody award is not without jurisdiction.[10] In the former instance the court is exercising its duty to protect the interests of the state and thus has a basis for jurisdiction; in the latter the theory is that the court as a judicial body is determining the rights of the parties *inter sese.* As a necessary *sequitur,* when the respondent has received no personal service and the child is not living within the territorial jurisdiction of the state there is no possible basis for the exercise of jurisdiction.[11] The foregoing concept of jurisdiction is basic. It is not necessary to direct our attention to questions of the legal domicile of the child. This is clearly so where the award is merely a settlement of the legal rights of the parents, for it need only be shown that both parents received personal service. And in so far as the award is a regulation of the child's condition within the state, it is like the appointment of a guardian of the child's person which is always a matter of local control.[12] The stress placed upon domicile of the child in custody cases is due to the fact that it is considered to be a determination of status which normally by the law of conflicts is reserved to the state of domicile. This however emphasizes the parent-child relationship instead of the state-child relationship which exists between the child and the particular state within which it

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[6] See for example Ross v. Ross, 5 P. (2d) 246 (Colo. 1931); Gifford v. Gifford, 297 Pac. 1100 (Idaho 1931).

[7] Payton v. Payton, 29 N. M. 618, 225 Pac. 576 (1924).

[8] The state's interest in the custody award is similar to its interest in the divorce decree itself. See Gavit, *Jurisdiction of the Subject Matter and Res Judicata* (1932) 80 U. OF PA. L. REV. 387.

[9] Black v. Black, 110 Ohio 392, 144 N. E. 268 (1924); Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779 (1917).

[10] Wear v. Wear, 130 Kan. 205, 285 Pac. 606 (1930); Payton v. Payton, *supra* note 7.

[11] Kline v. Kline, 57 Iowa 386, 10 N. W. 285 (1881); Weber v. Redding, 200 Ind. 448, 163 N. E. 269 (1928); May v. May, 253 N. Y. Supp. 606 (1931).

[12] De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345 (1896); Woodworth v. Spring, 4 Allen 321 (Mass. 1862); 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) § 857; 2 PIGOTT, FOREIGN JUDGMENTS AND JURISDICTION (3d ed. 1908) 280. Courts have, however, repeatedly mentioned domicile as the basis of jurisdiction although in most instances the child's residence and domicile coincided. But see Person v. Person, 135 So. 225 (La. 1931) in which domicile appears to have been the only basis for jurisdiction.

resides.[13] The latter is purely a personal matter and is dependent not upon domicile but upon residence.[14]

With this basic concept as to the nature of a custody award in mind we are prepared to examine and determine the answer to our question, "What effect is to be given in one state to the custody decrees of another?" The problem is presented by the cases wherein all the parties were within the state but where subsequent to the decree the child was removed to state *B* by a parent having no right to the custody of the child. The courts of state *B* are then asked to give full faith and credit to the original decree. It is undisputed that if a change in circumstances is discovered, state *B* is free to disregard the prior adjudication.[15] The infant is regarded as a ward of the court of chancery and since the welfare of the child is always a paramount consideration,[16] it will not permit that child's well-being to be "jeopardized by the previous contest between the parents".[17] But if a change in circumstances is not alleged must the decree of state *A* be recognized by state *B* without a rehearing of the merits of the case? Here is a decree rendered by the court of another state, acting within its jurisdiction, and propounded at a time when all the parties were before it. It would appear, on first thought, that the award therefore is entitled to full faith and credit. Many courts have so held, or at least there is *dicta* to that effect in their opinions.[18] The decisions *contra* are exemplified by the case of *In re Bort*,[19] wherein after a divorce was issued in Wisconsin and the custody of the children awarded to the father, it appeared that the mother had spirited the children away to Kansas. The father then attempted to enforce the Wisconsin order in Kansas, under the "full faith and credit" clause of the Constitution. Although the court conceded that as between the parents the decision was a finality yet it refused to be bound by the decree for the reason that it considered its chancery court to be the guardian of all children

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[13] The *in personam* nature of a decree determining "status" may be found in the case of McCormick v. Blaine, 178 N. E. 195 (Ill. 1931). In that case the Illinois court was asked to declare the defendant, who lived in California, insane and to appoint a guardian of his person, on the ground that this was an *in rem* proceeding determining status in the state of the defendant's legal domicile. The court properly refused to so do. Jurisdiction upon the doctrine of *parens patriæ* did not exist while the defendant was in another state. But see (1932) 80 U. OF PA. L. REV. 590.

[14] This avoids the difficulty otherwise created when a mother takes her child to another state and there seeks a divorce and custody award, and it is urged that the court has no jurisdiction to award custody since the child's domicile follows its father's. 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) § 1877; GOODRICH, CONFLICT OF LAWS (1927) § 36; see White v. White, 27 N. H. 26, 86 Atl. 353 (1913). The desirable rule would permit the making of an award.

[15] State *B's* jurisdiction to so act may however be limited by statute to cases where the child's legal domicile is in state *B*. Thus, in Massachusetts it has been held that a statute which gave the court power to make custody awards "if . . . minor children . . . are *inhabitants* of this commonwealth," limited the court's authority to those cases where the child's legal domicile was in Massachusetts. Glass v. Glass, 260 Mass. 562, 157 N. E. 621 (1927); *cf.* Martin v. Gardner, 240 Mass. 350, 134 N. E. 380 (1932).

[16] "The welfare of the child may be best subserved at one time by awarding its custody to one parent, and at another time just the opposite course should be taken. These judgments are, necessarily, provisional and temporary in character and are, ordinarily, not *res judicata*, either in the same court or that of a foreign jurisdiction, except as to facts before the court at the time of the judgment. Mylius v. Cargill, 19 N. M. 278, 283, 142 Pac. 918 (1914); CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 156.

[17] Pearce v. Pearce, 136 Ala. 188, 33 So. 883 (1903).

[18] Milner v. Gatlin, 139 Ga. 109, 76 S. E. 857 (1912); Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60 (1907); Nipp v. District Court, 46 Mont. 425, 128 Pac. 596 (1912); Griffin v. Griffin, 95 Ore. 78, 187 Pac. 596 (1920); Motichka v. Rollands, 144 Wash. 565, 258 Pac. 383 (1927); GOODRICH, CONFLICT OF LAWS (1927) § 131; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) § 155. *Contra: In re* Bort, 25 Kan. 308 (1881); *In re* Alderman, 157 N. C. 507, 73 S. E. 126 (1911); Commonwealth v. Daven, 298 Pa. 416, 148 Atl. 524 (1930); HOCHHEIMER, CUSTODY OF INFANTS (2d ed. 1891) § 77; SPENCER, DOMESTIC RELATIONS (1911) § 446.

[19] *Supra* note 18.

within the state, and as such empowered to protect and advance the welfare of these children despite the rights of parents *inter sese*. The only question considered by the court was, "What do the best interests of the children require?" The theory, then, upon which this case and those in accord with it are predicated, is that the state has supreme guardianship as *parens patriæ* of all infants within its border, and *if anything retards or hampers the child's development into a good citizen*, then the interest of society requires that the state assert its supreme guardianship and protect its ward.[20] That the decisions of other courts are not conclusive, appears to be a sound conclusion. While, theoretically, state *B* is required to recognize the legal rights of the parents as established by the courts of state *A*, this in effect becomes a nullity when we admit the principle that each sovereign power may determine for itself those matters which affect the welfare of its residents.[21] In examining the nature of an award decree it appeared that not only was the decree a settlement of the legal claims of the parents but it was also an expression by the state through its courts as to what it thought the best interests of society and of the child demanded. The latter element is always a matter of local control. Therefore, from the very nature of the decree we are led to the conclusion that state *B* is under no legal compunction to enforce the decree of state *A* in defeat of its own powers in the matter.[22]

What justification, if any, is there then for a continued reiteration by the courts that award decrees, issued when all the parties were within the original state, are entitled to recognition?[23] It is true that a relitigation of old matters in cases involving divorce decrees and custody awards should be restricted as far as possible. Interminable litigation with respect to a most delicate subject is ill-advised. No special benefit accrues to the child or society from a re-examination of the shortcomings of the parents and a re-publication of the various grounds upon which the divorce decree was granted. It is a "rewashing of dirty linen" which if possible should be avoided. Therefore if there is some assurance that the award of state *A* is a judicious one, state *B* ought not refuse to enforce it.[24] Such assurance probably can be found in the fact that the court which grants a divorce with all the parties before it is probably best qualified to decide which parent should be awarded custody of the child.[25] There is a high degree of probability that in the light of all the facts it has heard, its judgment will be a proper one and, therefore, without further review, acceptable by any state that may subsequently have an interest in the child's welfare. If, then, the desire to avoid a review of the case is great, and if the court is convinced that there was a sufficient opportunity for the interests of all to be adequately protected by the decree then the court is justified in renouncing jurisdiction.[26]

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[20] Burns v. Shapley, 16 Ala. App. *297*, 77 So. 447 (1917); Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1 (1910); HOCHHEIMER, *op. cit. supra* note 18, § 12.

[21] Commonwealth v. Wormser, 260 Pa. 44, 103 Atl. 500 (1918); Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624 (1925); 2 SCHOULER, *op. cit. supra* note 14, § 1896.

[22] The conclusiveness of the decree only as to the rights of the parties is clearly shown in the case of Wear v. Wear, 130 Kan. 205, 285 Pac. 606 (1930). In that case extraterritorial effect was given to a decree solely because the pleading only put in issue the legal rights of the parents and did not state that the best interests of the child warranted another award.

[23] *Supra* note 18.

[24] It is to be noted that courts, which say that the decree is entitled to recognition, do not usually clearly indicate the voluntary nature of their decisions but instead seem to hedge and convey the impression that the conclusion is compelled by the "full faith and credit" clause. Thus we find in Griffin v. Griffin, *supra* note 18 at 83, 187 Pac. at 600 (1920), "a decree fixing the custody of a child is, however, *final* when the conditions existing at the time of its rendition remain the same, and *should* not be changed except when conditions have become different since the decree."

[25] 2 NELSON, DIVORCE AND SEPARATION (1895) § 975.

[26] Where, however, it appears that the respondent received no personal service and that the child and only one parent were before the court, then the reason for the rule disappears and State *B* should not renounce jurisdiction.

There is another group of cases which has not infrequently been before the courts in recent years, and which presents a variation of the same problem.[27] These are the cases where the court of original jurisdiction modified its decree and awarded the custody of the child to the other parent; but this change was ordered not while all the parties were still within the state but, instead, at a time when the child and its custodian had taken up a new residence in state *B* and had completely given up their home in state *A*. When faced with this situation most courts have held that they were not bound to accept and enforce the judgments without a review of the case.[28] One of the leading cases expressing this view is that of *Griffin v. Griffin* [29] in which a California court granted the custody of children to the mother who took them to Oregon and there established a residence. The father then obtained a modification of the decree in California wherein the custody of the children was awarded to him. Subsequently he asked the Oregon courts to recognize and give effect to the California judgment. His plea was refused, for it was adjudged that the California court lost jurisdiction over the matter when the children's domicile changed to Oregon and that that state alone, as *parens patriæ* "had the right to determine the status or domestic and social condition of infant citizens domiciled within its territory". The court, although it recognized the proposition that each state has the right to control the domestic condition of infants residing within its borders, was unwilling to rest its decision upon that alone and therefore also decided that the California court had lost jurisdiction. To say that jurisdiction was lost is perhaps going too far.[30] It may be argued that since the award was never a final one,[31] the court still retained jurisdiction to redetermine the rights of the parents [32] and to at least further adjudicate its own records in relation thereto.[33] The Oregon court in a decision nine years later [34] seems to have recognized this fact for, although still unwilling to arrive at its conclusion clearly in the face of the "full faith and credit" clause, it did not deny the continuance of the original court's jurisdiction but instead stated that the custody award is not to be considered as a final decree within the meaning of the "full faith and credit" clause of the Constitution; and that the real question is what the best interests of the child warrant. The greater importance of this latter element is even more clearly recognized in the recent case of *Ex parte Erving,*[35] wherein the court refused to recognize a modified custody award, rendered in New York after the father and child had acquired a new residence in New Jersey. The court in the opinion stated that,

> "Whether the orders of the New York court are res adjudicata as between the father and the mother *is beside the issue,* which is whether those

[27] The following law review articles have discussed various phases of the problem: Goodrich, *Custody of Children in Divorce Suits* (1921) 7 CORN. L. Q. 1; Note (1927) 13 VA. L. REV. 229; (1920) 20 COL. L. REV. 1023; (1930) 10 B. U. L. REV. 554; (1930) 78 U. OF PA. L. REV. 1023.

[28] Milner v. Gatlin, *supra* note 18; *Exparte* Erving, 157 Atl. 161 (N. J. 1931); Griffin v. Griffin, *supra* note 18; *In re* Groves, 109 Wash. 112, 186 Pac. 300 (1919). *Contra:* Burns v. Shapley, *supra* note 20; Nipp v. District Court, *supra* note 18.

[29] *Supra* note 18.

[30] Professor Beale points out that State *B* need not effectuate the decree because state *A* was without jurisdiction. He submits that upon divorce the parent with whom the child actually lives acquires or retains the power over the child's domicile. Apparently since domicile is made the basis of jurisdiction, state *A* no longer can act. But to say that domicile follows residence seems to emphasize in another form of words the importance of residence within the state as the true basis of all custody awards and goes even further to say that without it jurisdiction is lost. Beale, *The Progress of the Law* (1920) 34 HARV. L. REV. 50, 59.

[31] *Supra* note 2.

[32] Stetson v. Stetson, 80 Me. 483 (1888); Nipp v. District Court, *supra* note 17.

[33] Morrill v. Morrill, *supra* note 20.

[34] Barnes v. Lee, 128 Ore. 655, 275 Pac. 661 (1929).

[35] *Supra* note 28.

orders can bind this court as against the infant boy, in determining where his custody should go, he being a *resident* of this state and subject to its jurisdiction." [36]

In the light of the foregoing analysis these decisions are entirely proper.[37] That each state is supreme in its power to determine matters which concern or will affect the welfare of its residents we have already noted.[38] The courts of one state, therefore, though they retain jurisdiction in the matter, do not have the power to make an order with respect to a child within the jurisdiction of another state which will be binding on the courts of that other state. Further, when a decree is issued by a court with only one party before it, there is no great assurance that all matters have been properly examined. Thus neither legal nor judicial policy demands that such a decree, rendered while the child and its custodian resided elsewhere, be given effect in all states.[39]

It appears, therefore, that the conflicts problem raised by a custody award, though seemingly confused, is found, upon closer examination, to be a relatively simple one. Courts of other states need give no effect to these decrees because a state is never required to surrender its inherent power to determine for itself what the best interests of its residents require. However, when it appears that all parties were before the bar at the time when the original decree was issued, then there is so great an assurance that the decree was properly rendered that in the absence of an allegation that new facts have arisen, a court need not relitigate old issues.

E. F.

BURDEN OF PROOF UNDER SECTION 59 OF THE NEGOTIABLE INSTRUMENTS LAW—At the time of its adoption it was hoped and expected that the Uniform Negotiable Instruments Law would so clarify the law of negotiable instruments that the conflicting views which had previously proved such a retarding influence would disappear.[1] It was in this spirit that the Act was received by the banking and legal professions and no doubt the practical application of the Act to commercial problems has justified and will continue to justify much of this feeling. Nevertheless, it cannot be said that the Act is perfect or that the interpretation placed upon it by courts has been uniform. It is felt that such a criticism is justified by a consideration of the sharp differences of opinion and interpretation of Section 59 alone, although it is of course well known that there are such differences in the interpretation of other sections of the Act.[2]

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[36] Italics the writer's.

[37] The theory is that although state *A* had jurisdiction, in the strict sense, to modify its decree yet the recognition is not compelled since each state is supreme in its power to determine matters of welfare. However, the courts, arriving at the same result, have often gone the full length to say that state *A* was without jurisdiction. Steele v. Steele, 152 Miss. 365, 118 So. 721 (1928); Milner v. Gatlin; Griffin v. Griffin, both *supra* note 18.

[38] *Supra* note 21.

[39] In this connection it is to be noted that if the custodian of the child made an appearance and contested the modification of the decree before the court of original jurisdiction, then there may be, under these circumstances, a sufficient assurance that the modification is a proper one, to lead sister states to accept it without a review of the case. Nipp v. District Court, *supra* note 17, often cited as authority for the proposition that modified decrees are entitled to recognition in all states, is an example of a decision that might possibly be explained on this theory, for it appears that in that case both parents were before the court at the time it issued its modified decree.

[1] John D. Milliken, *A Consideration of the Uniform Negotiable Instruments Law* (1906) 39 CHICAGO L. NEWS 76.

[2] A problem very similar to that discussed in this note is that arising under § 24 of the Act as to whether the burden of establishing lack of consideration against a person not a

Section 59 reads as follows: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. . . ." The problem to be considered here is just what is meant by the word "burden". Does it mean the mere burden of going forward with the evidence or does it mean burden of proof in its strict sense, *i. e.*, that type of burden which never shifts but which when all the evidence has been presented requires the holder to show by a preponderance of the evidence that he is a holder in due course?[3]

Suppose a case where the plaintiff has introduced his note as evidence at the trial. The defendant then shows fraud in the inception of the note. Section 59 says the burden is on the holder to prove he is a holder in due course. Let us suppose that the plaintiff introduces as evidence all the circumstances under which he acquired the note and that the defendant offers no more testimony. Should the court charge the jury that the burden of showing notice of the fraud by a preponderance of the evidence is on the defendant or should it charge that the jury must be satisfied after all the evidence is in that the plaintiff has by the greater weight of testimony proved himself a *bona fide* holder without notice of the infirmity? What "burden" is it that the Act places on the holder? Should the defendant in our supposititious case have introduced more testimony because the only burden that rested on the holder was that of going forward with the evidence? If so, then the court might have felt compelled to direct a verdict for the plaintiff.[4]

Prior to the adoption of the Negotiable Instruments Law the courts of the various states differed on the question. Some held that along with the burden of showing fraud by the preponderance of evidence that it was also incumbent upon the maker of the note to show notice to the holder of this defect.[5] Many courts, however, adopted the opposite view that the burden was on the holder to show himself a holder without notice of the fraud by the weight of testimony.[6] The adoption of the Act has had but little effect on the settlement of the problem and most of those jurisdictions which prior to the Act required the defendant to establish his case by a preponderance of the evidence still adhere to the same rule,[7] while the adoption of the Act in the states holding the opposite view seems to have merely strengthened their conviction.[8] Indeed, jurisdictions which represented

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holder in due course is on the maker or whether such burden is on the holder to show consideration. First National Bank of Blackfoot v. Doschades, 47 Idaho 661, 279 Pac. 416 (1929); (1929) 43 HARV. L. REV. 315; (1923) 96 CENT. LAW J. 350.

[3] THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 353; Bohlen, *Rebuttable Presumptions of Law* (1920) 68 U. OF PA. L. REV. 307.

[4] Van Slyke v. Rooks, 181 Mich. 88, 147 N. W. 579 (1914); Johnson v. Buffalo Center Bank, 134 Iowa 731, 112 N. W. 165 (1907). The direction of a verdict in such a case would seem to depend on the view that the particular jurisdiction takes with regard to the direction of a verdict, some courts holding that though the holder's testimony has been uncontradicted the evidence should nevertheless be submitted to a jury as to its credibility. Joy v. Diefendorf, 130 N. Y. 6, 28 N. E. 602 (1891); Connelly v. Greenfield Sav. Bank, 192 Iowa 876, 185 N. W. 887 (1921); Cosson, *Direction of Verdicts,* (1924) 9 IOWA L. BULL. 169; Philips v. Eldridge, 221 Mass. 103, 108 N. E. 909 (1915); Honigman, *Proof of Good Faith,* (1925) 23 MICH. L. REV. 870.

[5] Wright Inv. Co. v. Friscoe Realty Co., 178 Mo. 72, 77 S. W. 296 (1903); Leavitt v. Taylor, 163 Mo. 158, 63 S. W. 385 (1901); Eames v. Crosier, 101 Cal. 260, 35 Pac. 873 (1894).

[6] Joy v. Diefendorf, *supra* note 4; Sullivan v. Langley, 120 Mass. 437 (1876); Williams v. Huntingdon, 68 Md. 590, 13 Atl. 336 (1888); Lerch Hardware Co. v. First National Bank of Columbia, 109 Pa. 240 (1885); Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306 (1889); Thamling v. Duffy, 14 Mont. 567, 37 Pac. 363 (1894).

[7] Downs v. Horton, 287 Mo. 414, 230 S. W. 103 (1921); People's State Bank v. Penello, 39 Cal. App. 139, 178 Pac. 326 (1922); Spires v. Jones, 212 Ala. 117, 101 So. 753 (1924).

[8] Leavitt v. Thurston, 38 Utah 351, 113 Pac. 77 (1911); Arnd v. Aylesworth, 145 Iowa 185, 123 N. W. 1000 (1909); Second National Bank v. Hoffman, 229 Pa. 429, 78 Atl.

the former rule [9] prior to the Act as well as jurisdictions on the other side [10] have announced that Section 59 was intended merely to codify the common law and have blithely followed the old rules. The conflict as to which party must prove or disprove notice of defect in the note to the holder still exists.

In view of this situation it would not be surprising to find a great deal of discussion *pro* and *con* as to whether Section 59 should be amended and as to whether the holder or the maker should be compelled to sustain the burden of showing a preponderance of evidence as to whether the holder is or is not a holder without notice of the defect. Strange to say, very little discussion seems to have been centered about the problem. What little there is recognizes the fact that, as it is, the Section does not supply a satisfactory rule of law. Professor Vernier has stated that "Section 59 should be restated to make clearer where the ultimate burden of proof is to lie," [11] while Professor Kent has suggested that "Section 59 has likewise failed to settle the conflict on the ultimate burden of proof when the issue is whether a holder is a holder in due course" and that this Section "might be dropped from the Act without great loss".[12]

A review of the varied interpretations and results attained under the statute might seem to be some justification for this last statement. Courts have adopted one of three possible interpretations in their construction of the section. They have (1) Interpreted the Act as codifying the common law rule that the ultimate burden of proving himself a holder in due course without notice by the preponderance of the evidence was on holder;[13] (2) Interpreted the Act as codifying the common law rule that the ultimate burden was on the maker to prove by weight of testimony that the holder was a holder with notice of the infirmities of the instrument;[14] (3) Handed down decisions that appear to conflict with one another and which appear to apply either rule indiscriminately so as to leave the problem still open in these jurisdictions.

Subsequent to the adoption of the Act, Alabama in *German-American National Bank v. Lewis* [15] would seem to have adhered to the rule that the weight of testimony must be with the defendant to prove that the holder had notice of the infirmities in the instrument. But it is interesting to note that the cases which are cited in that decision as authority for the proposition and which were all decided prior to the Act are not in point. The language of *Slaughter v. First National Bank* [16] is ambiguous, as is that of *Alabama National Bank v. Halsey*.[17] This latter case cites as authority on this problem two others which are not in

1002 (1911); Detroit National Bank v. Union Trust Co., 145 Mich. 656, 108 N. W. 1092 (1906); Farmers' State Bank of Garden City v. Cooke, 149 Minn. *227*, 183 N. W. 137 (1921); Justice v. Stonecipher, *267* Ill. 448, 108 N. E. *722* (1915); Hodge v. Smith, 130 Wis. 326, 110 N. W. 192 (1907); Walkof v. Strober, 200 App. Div. 104, 192 N. Y. Supp. 716 (1922).

[9] Downs v. Horton, *supra* note 7; Deshazo v. Lamar, 17 Ala. App. 392, 92 So. 78 (1920); the actual holding of the latter case appears to be *contra* to the rule said to exist in Alabama.

[10] Schultheis v. Sellers, *223* Pa. 513, *72* Atl. 887 (1909); Hodge v. Smith, *supra* note 8.

[11] Vernier, *Amendments to the Negotiable Instruments Law* (1929) 24 ILL. L. REV. 150, 163.

[12] Kent, *Some Further Necessary Amendments to the Uniform Negotiable Instruments Law* (1928) 22 ILL. L. REV. 833, 850.

[13] Schulthies v. Sellers, *supra* note 10.

[14] ". . . the Negotiable Instruments Law . . . is just what it purported to be, a codification of the then existing laws relating to negotiable instruments . . . The 'burden to prove', which the statute says is on the holder under certain circumstances, is the same burden that was upon him under like circumstances before the enactment of the statute." Downs v. Horton, *supra* note 7, at 431, 230 S. W. at 108.

[15] 9 Ala. App. 352, 63 So. 741 (1913).

[16] 109 Ala. 157, 19 So. 430 (1895).

[17] 109 Ala. 196, 19 So. 522 (1895).

point.[18] In *Wynne v. Rosette* [19] the ultimate burden was placed upon the defendant as to notice, but the question in that case was whether defendant was such a purchaser of land as to avoid a vendor's lien. The situation of *First National Bank v. Sproull* [20] was a question of conversion of chattels in which the plaintiff, holder of notes and chattel mortgage, had an interest. The defendant was then required to show he sold the chattels without notice of the encumbrance. The case of *First National Bank v. Dawson,*[21] though in point, says, "On this issue of notice *vel non,* the burden of proof was on the defendant." But the decisions cited as authority for this proposition are not in point.[22] The leading Alabama case subsequent to the Act, *Elmore County Bank v. Avant,*[23] reviews the above decisions and finally adopts the rule that the ultimate burden is on the defendant by quoting from the ambiguous holding of *Slaughter v. First National Bank,*[24] which in turn cited no authority. The *Elmore County Bank v. Avant* decision is later cited in *Spires v. Jones,*[25] a suit for the cancellation of a note, but in the same breath the court cites *Deshazo v. Lamar* [26] which, referring to the Act, expressly says that the holder must prove he took his note in good faith and for value and at that time had no notice of any infirmity. What the law is in Alabama, therefore, seems uncertain even though it has been said by a leading authority [27] to be certain in that state. Were Section 59 clear in its meaning this confusion would not exist.

So, also, in Oklahoma is the law uncertain, due to the ambiguous language of the court in the decisions in *Forbes v. First National Bank* [28] and in *Stephens v. Pierce.*[29] It is difficult to determine whether the court in those decisions is referring to the burden of producing the preponderance of the evidence or merely going forward with the evidence. The Montana decision of *Citizens State Bank v. Snelling* [30] and the later holding of *Matteson v. Trask* [31] seem to conflict in their meaning when the language of these cases is compared. Again in Kansas by comparing *Stephens v. Keegan* [32] with *Schmidt v. Benedict* [33] the same conclusion as to the law in that jurisdiction may be reached. The decision in California of *People's State Bank v. Penello* [34] construed the ambiguous language of a decision prior to the statute [35] as meaning that the ultimate burden, *i. e.,* the

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[18] In Ross v. Drinkard's Adm'r., 35 Ala. 434 (1860), the question was whether the indorsee should have the burden of proving payment of valuable consideration by him when it was shown that the bill was obtained by fraud. At that, the real burden was placed on holder in accordance with the universal rule. This was the same question in Mayor and Alderman of Wetumtka v. Wetumtka Wharf Co., 63 Ala. 611 (1879).

[19] 66 Ala. 517 (1880).

[20] 105 Ala. 275, 16 So. 879 (1894).

[21] 78 Ala. 67, 71 (1884).

[22] Carrol v. Malone, 28 Ala. 521 (1856) presents the question of notice to a debtor of the assignment of his indebtedness and the validity of a set-off against that debt. Carpenter v. Devon, 6 Ala. 718 (1844) is a question of who must prove consent alleged to have been given by the surety to suspension of execution by judgment creditor. Walker v. Palmer, 24 Ala. 358 (1854) is another case of the same type to the effect that an agent who purchases land which he was to sell for his principal must prove he had his principal's consent.

[23] 189 Ala. 418, 66 So. 509 (1914).

[24] *Supra* note 16.

[25] 212 Ala. 117, 101 So. 753 (1924).

[26] 17 Ala. App. 392, 85 So. 586 (1920).

[27] BRANNAN, NEGOTIABLE INSTRUMENTS (4th ed. 1926) 535.

[28] 21 Okla. 206, 95 Pac. 785 (1908).

[29] 79 Okla. 290, 193 Pac. 417 (1920).

[30] 55 Mont. 476, 178 Pac. 744 (1918).

[31] 63 Mont. 160, 206 Pac. 428 (1922).

[32] 103 Kan. 79, 172 Pac. 1025 (1918).

[33] 104 Kan. 196, 178 Pac. 444 (1919).

[34] *Supra* note 7.

[35] Eames v. Crosier, *supra* note 5, 263. "Upon proof by the defendant of the fraud or illegality in the inception of the note, the burden is cast upon the endorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before

weight of testimony as to the infirmities in the instrument, must be with the defendant. Thus a conclusion is justified that "in most cases where the burden of proof as to notice has been placed on the defendant, the result may be attributed to an indiscriminate usage of the term 'burden of proof', in the dual sense of burden of proceeding with the evidence and burden of establishing by the preponderance of the evidence." [36]

Section 196 of the Negotiable Instruments Act reads that, "In any case not provided for in this act the rules of law and equity including the law merchant shall govern." Mr. Crawford, the framer of the Act, has reiterated this rule elsewhere.[37] Shall we as intimated in several cases [38] resort to the common law when the Act is *not clear* in its meaning? Professor Eaton writes,

> "If such a statute is to have read into it the law prior to its enactment, the value of codifying the law on the subject of negotiable instruments will be greatly impaired, if not destroyed, and the very object for which it was enacted will be frustrated. Where the language of such an Act is clear, it must control, whatever may have been the prior statutes and decisions on the subject. *When there is a substantial doubt as to the meaning of the language used, the old law is a valuable source of information.*" [39]

Before deciding which one of the views under the "old law" to which we ought to refer, however, it would be wise to examine briefly the arguments on both sides of this question.

Probably the most potent argument for requiring the holder to present the preponderance of evidence in favor of his due course holding is that it is quite easy for a payee who has induced the maker to create the instrument by fraud or some other circumstance which would be a defense against the payee [40] to place this note in the hands of another party to collect for him. To avoid this it has been said that a presumption of such facts arises "which must be rebutted by the holder showing affirmatively that he gave value".[41] As to this element of notice to a holder of the fraud, however, it is suggested that once this holder has shown he paid value before maturity in the ordinary course of business in good faith that this presumption that he is suing for someone else should be deemed properly rebutted. The reason for the rule has been avoided by only requiring the holder to go forward with the evidence and is no real reason why he must produce the preponderance of evidence as to lack of notice of the fraud.

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maturity, or from an innocent endorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts, impeaching its validity, the burden is cast upon the defendant to show if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities."

[36] Honigman, *op. cit. supra* note 4, 872.

[37] CRAWFORD, NEGOTIABLE INSTRUMENTS (3d ed. 1908) 4.

[38] "Care should be taken to adhere as closely as possible to the obvious meaning of the act without resort to that which had theretofore been the law of this commonwealth, unless necessary to dissipate obscurity or doubt, especially in instances when there is a difference in the law of the different states." Union Trust Co. v. McGinty, 212 Mass. 205, 207, 98 N. E. 679, 680 (1912).

[39] Italics the writer's. Eaton, *On Uniformity in Judicial Decisions of Cases Arising Under the Uniform Negotiable Instruments Act* (1913) 12 MICH. L. REV. 89, 91.

[40] Section 55 of the N. I. L. says, "The title of a person who negotiates an instrument is defective within the meaning of this Act when he obtained the instrument or any signature thereto by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud."

[41] Fitch v. Jones, 32 Eng. L. & Eq. 134, 137 (1855); Carrier v. Cameron, 31 Mich. 373 (1875); Kellog v. Curtis, 69 Me. 212 (1879). Giberson v. Jolley, Thamling v. Duffy, both *supra* note 6.

But it would certainly seem to be no hardship to require the holder to prove his case.[42] This merely follows the elementary principle of all suits. If the holder had notice of the infirmity in the inception of the instrument he is not a *bona fide* holder and is therefore subject to such defenses of the maker. It is entirely consistent with other situations that the holder should prove all the elements of his character of a *bona fide* holder, and it is not possible to prove good faith unless the lack of notice be found.

Moreover, a consideration of the Negotiable Instruments Law would seem to justify such a conclusion. The *prima facie* case given to the holder by Section 59 does not relieve the holder of proving all the facts essential to his recovery. He need no longer go forward with the evidence after he has presented his instrument which on its face purports to be valid. But once the maker pleads fraud, on whom, of course, there is no doubt there rests the duty of affirmatively proving this fact by the preponderance of evidence, the *prima facie* case is destroyed, and the plaintiff should be required to *prove* his case. Because the defendant pleaded *fraud* affirmatively seems to be no reason why he should be taken to have pleaded *notice* affirmatively, an essential element of a holder's proposition.[43]

The fact that the holder should clearly establish his right to recover has been recognized in the Alabama decision of *Somerall v. Citizens Bank,*[44] a jurisdiction often cited as placing upon the maker the burden of establishing notice to holder by preponderance of evidence.[45] In passing, it might be noted that the language of the decision might connote an intention to refer only to the burden of producing evidence, a meaning with which there would seem to be no fault to find.

This brings us to a consideration of the arguments in favor of the view adopted by those jurisdictions who place the burden on the defendant of producing a preponderance of the evidence of notice to the holder regarding the defenses of the maker. It might first of all be said to aid negotiability if such a view is followed, but even if a potential holder did know of the rule it would scarcely be likely to induce him to refrain from the purchase if he were acting *bona fide.* The argument has also been advanced that "when loss must fall upon one of two innocent parties, it must be placed upon the one whose negligence was the occasion therefor," and that "while the situation of the defrauded makers of this negotiable

[42] "Those who seek to secure the advantages which the commercial law confers upon the holders of bank bills and negotiable paper must bring themselves within the conditions which the law prescribes to establish the character of a bona fide holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith in the usual course of business, before maturity, for full value, and without notice of any facts affecting the validity of the paper." Thamling v. Duffy, *supra* note 6, at 303, 37 Pac. at 365.

"It would be a departure from principle to hold that the maker must prove that the holder had notice of the fraud. Whether he had knowledge or not is a matter peculiarly within his own knowledge. It needs no more than a bare statement of the proposition that the plaintiff's possession or non-possession of notice is a matter peculiarly within his own knowledge, to establish it to the satisfaction of a candid mind, and, if this proposition be established, then, it must follow that the proof should come from him, for few rules of law are better settled than that a party whose cause of action or defense rests upon facts peculiarly within his own knowledge, must prove those facts." Giberson v. Jolley, *supra* note 6, 574; (1923) 11 CAL. L. REV. 179, 182.

[43] Negotiable Instruments Law § 52. "However, upon proof of a defect in the inception of an instrument, it certainly can not be denied that a literal interpretation of the statute would place on the plaintiff the burden of establishing by the preponderance of the evidence that he is a holder in due course." Honigman, *op. cit. supra* note 4 at 874; Note (1926) 1 IND. L. J. 49; (1909) 58 U. OF PA. L. REV. 113; (1915) 63 U. OF PA. L. REV. 802.

[44] 211 Ala. 630, 632, 101 So. 429, 431 (1924) ". . . it seems clear that the statute put upon the plaintiff the burden of showing that it was 'a holder in due course'; but it is our opinion that, when plaintiff proved that it paid full value for the note before maturity, it established prima facie that it was a holder in due course, and that the burden of showing that the plaintiff had notice of the infirmity of its assignor's title rested upon defendants; . . . the burden is then shifted back to the defendant to prove the holder's notice or knowledge of the specific facts invalidating the instrument."

[45] BRANNAN, NEGOTIABLE INSTRUMENTS (4th ed. 1926) 535.

paper makes strong appeal to the equitable consideration of the court, yet the equities of the plaintiff are entitled to equal consideration." [46] However, it must be remembered that it should be for the plaintiff to prove himself not merely a holder in due course, but an *innocent party* before such equities are to be balanced.

The most popular argument for the case of those who would require the maker to prove notice of fraud to the holder by a preponderance of the evidence is that otherwise the holder is required to prove an impossible negative.[47] This opinion has, however, been subjected to three objections.[48] In the first place, the holder as plaintiff is not required to prove an absolute lack of notice but only sufficient facts from which a jury may infer lack of notice of the defects in the instrument. Secondly, it has been pointed out that this negative is not an impossible negative since the facts are peculiarly within the knowledge of the holder as to the circumstances under which he acquired his instrument. Thirdly, it is no new thing in the law to require a plaintiff to establish to the satisfaction of a jury the existence of a negative.[49] This is apparent in a suit on a contract where the promisee alleges non-performance by the defendant.[50] Then, too, in a suit on a promissory note "non-payment is a part of the plaintiff's case, and it must be proved by him or for him before he can win out. It is provisionally proved for him by a rebuttable *presumptio juris*." [51]

Downs v. Horton [52] is probably the case which presents the strongest argument in favor of making the defendant prove notice to the plaintiff by the weight of testimony. It is said there that it is the pleadings which place this burden upon the defendant. Recognizing the distinction between the burdens of production of evidence and preponderance of evidence the court says, ". . . it must be held that the 'burden of proof' of the statute is 'the burden of evidence' as distinguished from the 'burden of proof' in its strict sense". The court then assumes the situation where the petition alleges the execution of the note and the defense of fraud coupled with an averment that the plaintiff had knowledge of this fact when he took the instrument. The plaintiff then traverses the defense. Then the court says,

> "It, therefore, devolves upon him (defendant) to show by the greater weight of evidence that the note was obtained by fraud and that plaintiff had actual knowledge of the facts constituting the fraud when he took it. . . . This obligation, the burden of proof in its primary sense, rests upon the defendant throughout the trial, and if he fails to discharge it, the plaintiff is entitled to recover. . . . the defendant to begin with had both the burden of proof and the burden of evidence."

This reasoning ignores the fact that the plaintiff from the very beginning of his case always had what this court terms "the burden of proof in its primary sense" but that it was not necessary to allege lack of notice or that he was a *bona fide* holder until the defendant rebutted the presumption afforded him by Section 59.

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[46] Loomis v. Cole, 119 Okla. 203, at 205, 249 Pac. 327, at 329 (1926).

[47] DANIEL, NEGOTIABLE INSTRUMENTS (1913) § 819.

[48] Giberson v. Jolley, *supra* note 6; Honigman, *op. cit. supra* note 4.

[49] "If the negative of an issue is a part of the *actor's* case, he should allege it, and he most certainly must prove it; and if the *reus* alleges the affirmative of that issue, he does not have to prove it.

"It is neither impossible nor unknown nor uncommon for an attack or case to be constituted, in whole or in part, of a negative. When a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative." Fisk, *Burden of Proof* (1927) 1 U. CINN. L. REV. 257, 280; Note (1929) 39 YALE L. J. 117, 118.

[50] Mississinewa Min. Co. v. Andrews, 22 Ind. App. 523, 54 N. E. 146 (1899).

[51] Fisk, *op. cit. supra* note 49, at 280.

[52] *Supra* note 7; BRANNAN, *op. cit. supra* note 45, 534; Chafee, *Bills and Notes* (1919) HARV. L. REV. 255, 274; (1919) 32 HARV. L. REV. 729; (1922) 6 MINN. L. REV. 313; (1919) 88 CENT. L. J. 372.

To allege this in his declaration would be pleading anticipatory matter. By proving fraud it is not the defendant who makes an issue of the due course holding. He only destroys the *prima facie* case of the plaintiff. The court apparently overlooked the fact that a denial may be alleged affirmatively.[53]

> "It is not correct to say, that the burden of proof of a case is always determined by the pleadings or by the issues made up by the pleadings. *The burden of proving a case is made up by the law.*[54] As soon as the *reus* is lined up for the attack upon him, the law automatically places the burden of proof of the case upon the *actor* and there it remains unalterably, immovably and uninterruptedly. The law so acts before issues are made up by the pleadings, and such issues have at no time any control over the burden of proof so fixed. . . . They may control the going ahead with the proof, but they can neither determine the burden of proving the case, nor change it." [55]

This, in as concise a manner as it is possible to present it, is the conflict which exists in the law. A comparison of the arguments *pro* and *con* seems to justify the conclusion that the better view is that which places the burden on the holder to present the *preponderance of testimony* that he has had no notice of the fraud though there is eminent authority to the contrary.[56] But there is still another convincing argument for the adoption of this opinion. Mr. Crawford, the framer of the Uniform Negotiable Instruments Act, has stated that ". . . the rule adopted in the statute is the one which prevailed in New York [57] and many other states (*i. e.* the view here advocated).[58] In the light of this evidence, which is the best available due to the fact that the reports of the Committee have all been lost, we are almost compelled to adopt the above rule. Add to this a consideration of the fact that the express purpose of the Act was to make uniform the law of commercial paper in the various states, coupled with the fact that probably the weight of authority follows the rule which Mr. Crawford intended to codify and there remains a very strong argument why the states who hold the opposite view should reconstrue the statute. Of course, there remains the possibility of amending Section 59 to state its rule without ambiguity, but there seem at this time to be many considerations why the Act should not be amended.[59]

M. K. G.

TAX EXEMPTION OF CHARITABLE PROPERTY—The statute books of the various states today contain a wide variety of tax exemptions; so wide in fact, that there seems to be scarcely a subject which at some time has not known this act of grace on the part of the state.[1] Since the various bodies comprising the Union

[53] Downs v. Horton, *supra* note 7, at 443.

[54] "A statement of facts by way of defense which are merely inconsistent with those stated by the plaintiff is, in effect, a denial. It is not new matter. It admits nothing. It simply contradicts. . . . This being the effect of the testimony of defendant, the defense thereby interposed . . . must be treated as a denial . . . because that defense (general denial) permits . . . any and all facts which tend to negative the averments . . . which a plaintiff is required to establish." Mott v. Baxter, 29 Colo. 418, 420, 68 Pac. 220, 221 (1902).

[55] Italics the writer's.

[56] Fisk, *op. cit. supra* note 49, at 278.

[57] *Supra* note 52.

[58] Joy v. Diefendorf, *supra* note 6.

[59] CRAWFORD, NEGOTIABLE INSTRUMENTS (4th ed. 1916) § 59.

[1] For a full discussion of statutory tax exemption in general see Baker, *Tax Exemption Statutes* (1928) 7 TEX. L. REV. 50, 385; *ibid.* (1929) 8 TEX. L. REV. 197. For a discussion of exemptions to charitable institutions in West Virginia see Note (1928) 35 W. VA. L. Q.

are each actuated by individual concepts of altruism and various motives of commercialism, the diverse nature of these exemptions is not surprising.[2] The states are uniform, however, in making some exemption of the property of charitable organizations.

The reason for the exemption lies in the fact that the property of these organizations is engaged in work which relieves the state of a burden.[3] It is the state which generally assumes to care for the indigent, the poor, and the helpless. The assumption of these duties by charitable organizations relieves the burden of the state to that extent, and the saving to the state is repaid by relief from taxation. It is patent that the accepted theory places the exemption on a *quid pro quo* basis and involves no element of personal reward to the charitable organization as such.[4] The work of these organizations is without doubt commendable, but wisely enough the state has failed to take cognizance of this except in a most limited sense, and those courts which have attributed a different and extended meaning to the legislation on this point have handed down decisions which seem most ill-advised.[5] It is in fact a question whether the state itself should adopt a lenient policy in their tax exemptions in the face of the growing cost of government.[6]

The statutes which embrace exemptions to charity take various forms. In some of the states provision for such statutory exemption is expressly contained in the state constitution.[7] The statutes in general take one of two forms. First, they may exempt "institutions of public charity", or "property belonging to charitable institutions", or "property used for charitable purposes".[8] Secondly, the statute may take the form of an exemption of "property of literary, benevolent, charitable and scientific institutions and temperance societies", and the exemption may be granted where the organization engages in one or more of these enterprises.[9] Since a wider latitude is given to the courts under these statutes, and since the exemption may be granted although the organization does not engage in charity exclusively,[10] they are excluded from this note which proposes to deal

83. For the development of the law in Ohio see Heisel, *Exemption from Taxation of Property Used for Religious, Educational and Charitable Purposes in Ohio* (1929) 3 CINN. L. REV. 40.

[2] An interesting list of these exemptions will be found in Baker, *Tax Exemption Statutes* (1928) 7 TEX. L. REV. 50, 54 *et seq.*

[3] "The very objects for which taxes are, in large part, assessed, are to carry on educational and benevolent institutions of the state; and hence, there is great propriety in avoiding, as the constitution does, the imposition of any taxation upon those agencies which are themselves employed in the very work for which the state applies so large a part of its revenues." Travellers Ins. Co. v. Kent, 151 Ind. 349, 353, 50 N. E. 562, 563 (1898).

[4] ". . . and it is only in those cases where the property is put to some use calculated to minimize the expenses of government that public policy justifies the exemption." People *ex rel.* Medical Soc. of King's County v. Neff, 34 App. Div. 83, 85, 53 N. Y. Supp. 1077, 1079 (1898); see also Cartaret Academy v. State Board of Taxes and Assessment, 102 N. J. 525, 528, 133 Atl. 886, 887 (1926).

[5] This statement is made with particular reference to the facts of the cases cited *infra* notes 24 and 26.

[6] In New York $913,000,000 worth of property was exempted in 1925. PROC. OF NAT. TAX ASS'N (1927) 310.

[7] Constitutions containing permissive provisions are found in ILL. CONST., art. ix, § 2; NEV. CONST., art. x, § 1; N. C. CONST., art. v, § 5; N. D. CONST., art. xi; OHIO CONST., art. xii, § 2; PA. CONST. art ix, § 1. In some of the states the constitution provides that the property of charitable organizations shall be exempt. ARIZ. CONST., art. ix, § 2; ARK. CONST., art. xvi § 5; CONN. CONST., art. x, § 5; KAN. CONST., art. i, § 1; N. M. CONST., art. viii, § 3; OKLA. CONST., art. x, § 6.

[8] ALA. CODE (1928) § 3022; ARIZ. REV. CODE (1928) § 3066 (3); COLO. COMP. LAWS (1921) § 7178; GA. ANN. CODE (Michie, 1928) § 998; ILL. REV. STAT. (Cahill, 1929) c. 120, par. 2; ME. REV. STAT. (1930) c. 13, § 6; MINN. STAT. (Mason, 1927) § 1975; OHIO ANN. CODE (Throckmorton, 1930) § 5353; PA. STAT. (Supp. 1928) § 20546.

[9] CONN. COMP. LAWS (1921) § 7178; FLA. GEN. LAWS (Skillman, 1927) 877; MASS. GEN. LAWS (1921) c. 59 (5); N. Y. CONS. LAWS (Cahill, 1930) c. 61 (7).

[10] For example in Newton Centre Woman's Club v. Newton, 258 Mass. 326, 154 N. E. 846 (1927) one-sixth of the income of the organization was devoted to charity, but the building was held exempt because of the literary and other activities of the plaintiff.

with exemptions to charitable property alone. Similarly, although the courts often term religious organizations charitable, the exemptions granted to their property are more properly determined under other statutory provisions.[11] Hence they are not included in this discussion of eleemosynary institutions.

Many questions of interpretation arise in connection with these statutes.[12] The general rule applied to tax exempting statutes is one of strict interpretation.[13] The reason for such a rule is obvious. State expenditures are for the benefit of all the members of the state and the cost of these expenditures should be evenly distributed.[14] In interpreting legislation the courts must bear in mind that exemptions are acts of grace from the sovereign state and should only be granted when they are clearly expressed and intended, in order that a heavier burden of taxation should not unnecessarily be imposed on other property owners. When the exemption concerned charitable property some courts have applied the same rule of strict interpretation.[15] Other courts, however, conceding the rule of strict interpretation when it is applied to organizations for profit, have felt the need for and have applied a more liberal interpretation to statutes dealing with charitable property. A broader policy is probably justified when we are dealing with organizations which in effect "pay their own way", but whether this should extend beyond resolving the doubtful case in favor of the charity is questionable. In some of the states this seems to be all the effect that is granted to the rule of liberal interpretation, but in others the rule is given far more force and often leads to results which seem inexpedient, and especially so, when the language of the legislature seems clearly not to include such an exemption.[16]

To what and to whom does the exemption extend? In general it is clear that the exemption is an exemption of property. Some of the statutes have the effect of limiting the exemption to realty,[17] while others include realty and personalty.[18] The only statute which may give any difficulty on the question is the statute which grants the exemption to an "institution". Although it is conceivable that the word "institution" may have either the meaning of "organization" or "property" it is clear that it is the latter meaning which should govern.[19] The duty to tax relates generally to property and the exemption should likewise apply. At the outset it is clear then that the exemption is of property; "it is not a release *in personam* but a release *in rem*." [20]

No disagreement can be found among the courts as to the subject matter of the exemption, but there is some divergence of opinion as to just what property

[11] Provisions for the exemption of property engaged in religious purposes are present in every state and there is, therefore, no reason for deciding these cases under statutory provisions exempting charitable property as was done in Ferry Beach Park Ass'n v. Saco, 127 Me. 136, 142 Atl. 65 (1928) (missionary society); Sunday School Union v. Phila., 161 Pa. 307, 29 Atl. 26 (1894) (Sunday school). This confusion in terminology has probably arisen out of the broad meaning of a "charitable trust".

[12] Questions of interpretation are thoroughly discussed in ZOLLMAN, CHARITIES (1924) § 707 to § 724 incl.

[13] 4 COOLEY, TAXATION (4th ed. 1924) § 672.

[14] *Ibid.* § 653.

[15] *Ibid.* § 673.

[16] See the vigorous dissent of Frick, *C. J.*, in Salt Lake Lodge v. Groesback, 40 Utah 1, 29, 120 Pac. 192, 200 (1912).

[17] COLO. COMP. LAWS (1921) § 7178 (lots and buildings); CONN. COMP. LAWS (1921) § 7178 (real property).

[18] ME. REV. STAT. (1930) c. 13, § 6, (real and personal); IDAHO COMP. STAT. § 3099 (lands, buildings, equipment and fixtures).

[19] ZOLLMAN, *op. cit. supra* note 12, § 707. Under the wording of the New Hampshire statute a different conclusion might be drawn. N. H. PUB. LAWS (1926) c. 60, § 22. In Engstad v. Grand Forks County, 10 N. D. 54, 84 N. W. 577 (1900) the court decided that the word "institution" excluded from exemption property devoted to a charitable enterprise because it was run by an individual rather than a group.

[20] Trustees of the Academy of Richmond County v. Bohler, 80 Ga. 159, 165, 7 S. E. 633, 636 (1887).

is exempt. Since the vast majority of the states provide either that the property must be "used",[21] "exclusively used" [22] or "devoted" [23] to charity it would seem that little difficulty should arise. The reason for the divergence of opinion on this subject can be found in the adoption of the strict or liberal rule of interpreting these statutes. For example in *Salt Lake City v. Groesback* [24] a fraternal organization sought an exemption of its lodge building. The facts showed that the building was devoted to the social, intellectual and bibulous enjoyment of the members of the lodge, and that the funds of the organization in excess of the amount necessary for running the lodge and for the upkeep of the society were devoted to charity. The court held the property exempt under a statute which provided that the building must be used for strictly charitable purposes. The ground for the exemption was that the existence of a charitable organization demanded a building for the execution of the organization's charitable purposes, and that the building promoted membership which in turn gave greater opportunities for the performance of charitable work. However valid the reason and the necessity for a building it is certain that the effect of the decision is to nullify the word "used".[25] In another decision a pleasure and health resort for members of the organization was held exempt.[26] Such decisions are clearly open to objection and pave the way for easy evasion of the tax burden. Unquestionably it is true that when the organization has assumed such proportions that administrative buildings are necessary, these buildings should be considered to be within the meaning of the various acts, but these cases grant exemptions where the dominant use of the property was for the social benefit of the members of the organization and only in a most remote sense can it be said that a charitable use was involved. It is certainly a far cry from the theory that some public purpose must be satisfied before the exemption is justified and, fortunately, other courts have recognized this.[27]

Another instance where the application of the liberal rule of construction causes a divergence among the states is in the determination of whether property used for income, which income is to be used for charity, comes within the exemption. In *Widows and Orphans Fund v. Blount* [28] an organization owned a garage whose income was used for charitable purposes and the court held that it was exempt. The weight of authority is that the property is not exempt in such an instance;[29] that the use of the property in such a case is not for charity but for

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[21] *E. g.*, PA. STAT. (Supp. 1928) § 20546.

[22] *E. g.*, ALA. CODE (1928) § 3022.

[23] *E. g.*, LA. COMP. CONST. (Long, 1931) art. x, § 4.

[24] 40 Utah 1, 120 Pac. 192 (1912). *Accord*, Horton v. Colorado Springs Masonic Building Society, 64 Colo. 529, 173 Pac. 61 (1918) (lodge building which contained reading and smoking rooms and a large room used for dinners and dances).

[25] UTAH CONST., art. 13, § 3.

[26] Board of Comm'rs v. Masonic Ass'n, 80 Colo. 183, 250 Pac. 147 (1926); criticized in (1926) 25 MICH. L. REV. 815.

[27] Boston Lodge v. Boston, 217 Mass. 176, 104 N. E. 453 (1914) (lodge containing kitchen, dining room, billiard room, nine sleeping rooms); People *ex rel.* Troy Masonic Home Ass'n v. Byrne, 125 Misc. 212, 210 N. Y. Supp. 527 (1925) (lodge building); Wilson v. Licking Aerie, 104 Ohio 137, 135 N. E. 453 (1914) (lodge building containing club and social facilities); City of Horton v. Scottish Rites Benevolent Ass'n *et al.*, 111 Tex. 191, 230 S. W. 978 (1921) (lodge building); St. Louis Lodge v. Koeln, 262 Mo. 444, 445, 171 S. W. 329, 330 (1914). "Charity is not a promiscuous mixer. Here she modestly stands outside or goes her way and waits; waits until the plaintiff has finished using the spacious and comfortable rooms for the pleasure of its members; waits until the curtain has fallen upon the last scene of the vaudeville performance on the stage; until the billiard rooms have been deserted to the members; until the plaintiff has paid the cost of its own entertainment, and goes out and finds her, and hands her whatever it may have left in its pocket."

[28] 222 Ky. 717, 2 S. W. (2d) 394 (1928).

[29] ZOLLMAN, *op cit. supra* note 12, §§ 708, 709, 710; Jones v. Conn, 116 Ohio 1, 11, 55 N. E. 791, 794, "Real estate leased for profit is held in a long line of authorities, . . . not

profit. Even in those states which exempt lodge buildings, if a part of the building is rented out the courts tax such portion exempting only the part used for lodge purposes.[30] In *Massenburg v. Grand Lodge* [31] the objection to the exemption in this instance was stated thus:

> "In so far as such organizations are administrators and distributors of purely public charity, their property permanently in use for that purpose is exempt from taxation; but, in so far as they are capitalists or proprietors engaged in acquiring money or effects to be disbursed, property of any and every kind from which their income is derived is subject to be taxed the same as property generally." [32]

Decisions of the sort which exempt property from taxation if the income is used for charitable purposes fail to discern, or discerning, refuse to deem of importance, the fact that there is direct competition with property whose income is not so used, and that the non-charitable owner is thus placed at a disadvantage in the commercial world with his charitable competitor.[33] It is extremely doubtful whether it was ever intended that property whose income was devoted to charity should be exempt, and a plain reading of the statutes would certainly not reach this conclusion.[34] Forestalling such interpretation a provision has been inserted in many of the statutes which excepts from the exemption property which is leased or rented or used for income.[35]

Unquestionably a plain reading of the statutes makes the use and not the ownership the test of exemption, and property used for income or for social purposes, even if the owner is a charitable organization, does not come within these statutes.

There are two situations which must be distinguished from the ordinary use of property for profit. In the first instance fees may be exacted from the more prosperous portion of the inmates of the institution.[36] In this situation, provided that there is no element of private gain, the institution is in all jurisdictions held exempt. While it might be argued that here again the property is used for profit, the distinction must be noted that the property used for obtaining profit is itself engaged also in the charitable use, and the profits derived from some of the patients are used to support the very building and the portion of the inmates who are dependent on charity. It is generally considered that in this situation the making of profits is incidental to the main use of the building for charity. In the second instance the very type of charity to which the property is put may demand

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to be 'used exclusively for charitable purposes', the view being that property which is not used directly for the purposes and in the operation of the charity, but is employed for profit, is not used exclusively for the purposes of the charity and hence is not exempt. The fact that the entire profits are devoted to the charity's support will not alter the result."

[30] Massenburg v. Grand Lodge, 81 Ga. 212, 7 S. E. 636 (1888); Smith v. Board of Review, 305 Ill. 38, 136 N. E. 787 (1922).

[31] *Supra* note 30.

[32] At 218, 7 S. E. at 638.

[33] See Trustees of the Academy of Richmond County v. Bohler, *supra* note 20, at 164, "If property is allowed to be used as taxed property, it is also to be taxed. If it competes, in the common business and occupations of life, with the property of the owner, it must bear the tax which others bear."

[34] This would seem obvious from the reading of the statutes. In light of the decisions on this point it is interesting to note that the Tennessee statute now provides, ". . . and is unimproved and yields no income. All property belonging to such institutions and used in secular business and competing with a like business must pay taxes to the state and shall be taxed on its whole or partial value in proportion as the same may be used in competition with such business." TENN. CODE (1932) 1085, § 3.

[35] See, for example, the Illinois statute, *supra* note 8.

[36] Baptist Hospital v. City of Nashville, 150 Tenn. 589, 3 S. W. (2d) 1059 (1928); Sisters of St. Francis v. Board of Review, 231 Ill. 317, 82 N. E. 272 (1907); *cf.* City of San Antonio v. Santa Rosa Infirmary, 249 S. W. 498 (Tex. 1923).

that there be work performed by its inmates, and from this work there may be derived profits. Since the property does fulfill a "public purpose", and since the use of the building or land is not primarily for profit, the exemption which is granted in this situation does not seem subversive of the legislative intent, and therefore even in the jurisdiction which follows the strict rule of interpretation, the property is held exempt.[37] In line with these principles, Y. M. C. A. organizations are generally held to be exempt although they obtain income from renting rooms, and from other activities which are run for profit, although the organization as a whole is run at a loss.[38] The variety of enterprises in which these organizations engage often makes it difficult to draw the line.[39] But it is probable that where the benefits of these enterprises are allied with and help to foster the charitable purposes of the organization, and where they do not engage too publicly in the enterprise,[40] their exemption should be, and generally is, granted. But where the business, even if maintained within the quarters of the institution, is public in nature the rule of partial exemption seems the best solution of the problem.[41]

Were it not for the extremely facile manner in which some of the courts interpret the statutory exemption of charitable property, no quarrel could be found with such statutes. It is submitted that a stricter application of the rule that it is the *use* and not the *ownership* which gives rise to the exemption would render such decisions impossible. *N. S.*

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[37] *In re* House of Good Shepherd of Omaha, 113 Neb. 489, 203 N. W. 632 (1925); Conklin v. John Howard Industrial Home, 224 Mass. 222, 112 N. E. 606 (1916); House of Refuge v. Smith, 140 Pa. 387, 21 Atl. 353 (1891).

[38] Y. W. C. A. of Brooklyn v. City of New York, 137 Misc. 321, 243 N. Y. Supp. 294 (1928); Woman's Christian Ass'n of Phila. v. Lippincott, 153 Atl. 261 (N. J., 1908). Although these organizations are commonly exempt as charitable organizations, exemptions have been granted to them also on the ground that they are religious organizations. Commonwealth v. Y. M. C. A., 116 Ky. 711, 76 S. W. 522 (1903).

[39] In Young Men's Christian Ass'n's Appeal, 15 Pa. D. & C. Rep. 421 (1931), the building contained in addition to dormitories, cafeteria, restaurant, billiard rooms, reading rooms, social halls, class rooms and swimming pools, which are usually contained in such buildings a barber shop, a tailor shop and soda fountain. The court held the entire building exempt.

[40] Y. W. C. A. of the City of New York v. City of New York, 217 App. Div. 406, 216 N. Y. Supp. 248 (1926); *cf.* Y. M. C. A. v. Easton, 3 Pa. D. & C. Rep. 562 (1922).

[41] This is the general method of procedure for dealing with property that is only partially devoted to charitable work, and often the method is prescribed in the statute.